provisions to implement the Commission's order. They argue that, because the order lacks detail, the parties need a roadmap for implementation.[822] Verizon asserts that the order is largely self-executing and would be better implemented through business negotiations outside of this arbitration.[823]

245. We note that, after the parties briefed this issue, the U.S. Court of Appeals for the D.C. Circuit remanded the *ISP Intercarrier Compensation Order* to the Commission, holding that section 251(g) of the Act did not support the Commission's conclusion that ISP-bound traffic fell outside of the section 251(b)(5) reciprocal compensation obligation.[824] The court did not, however, vacate the compensation regime that the order established, nor did it reverse the Commission's conclusion that ISP-bound traffic is not subject to section 251(b)(5).[825] Consistent with the manner in which we have applied other rules affected by judicial remands, we resolve issues relating to compensation for ISP-bound traffic on the basis of existing law, which, in this instance, includes the applicable interim compensation mechanism.[826] To the extent that the Commission's rules change at a later date, the parties may implement those changes through their agreements' change of law procedures.

b. "Mirroring Rule" and Past-Due Payment

246. Under the "mirroring rule" in the *ISP Intercarrier Compensation Order*, incumbent LECs can only take advantage of the rate caps on compensation for ISP-bound traffic if they offer to exchange, at those same capped rates, all traffic subject to the reciprocal compensation provisions of section 251(b)(5).[827] The parties disagree about whether Verizon's existing offers to implement the mirroring rule must be memorialized in their agreements, and whether Verizon must pay reciprocal compensation that allegedly has accrued under existing agreements before it may take advantage of the capped rates. We reject the petitioners' proposed language on both of these points.

(Continued from previous page)
not reach agreement on implementation of the order. Letter from Jeffrey H. Dygert to Scott Randolph, Robert Quinn, Lisa B. Smith and Alexandra Wilson (July 11, 2001).

822 AT&T Brief at 79; WorldCom Brief at 79; Cox Brief at 31.

823 Verizon IC Brief at 2; Tr. at 1766-67.

824 *See WorldCom v. FCC*, 288 F.3d at 433-34.

825 *See id.* at 434.

826 *Cf. supra* para. 4.

827 *See ISP Intercarrier Compensation Order*, 16 FCC Rcd at 9193-94, para. 89.

(i) Positions of the Parties

247. AT&T and WorldCom propose language that would incorporate into their interconnection agreements Verizon's obligations under the mirroring rule.[828] They argue that Verizon's offer to carriers to implement the mirroring rule outside of this proceeding is insufficient. WorldCom contends that, if the offer is not memorialized in any other legally enforceable document, such as a filing with the Virginia Commission, it can be rescinded unilaterally at any time.[829] AT&T and WorldCom further argue that Verizon should not be permitted to take advantage of the rate caps until Verizon has paid them, at the rates that they claim were applicable, for their delivery of all ISP-bound traffic before the effective date of the *ISP Intercarrier Compensation Order*.[830] AT&T asserts that Verizon has unilaterally refused to pay millions of dollars in reciprocal compensation for ISP-bound traffic that accrued during the period before the *ISP Intercarrier Compensation Order* established a new compensation regime.[831] WorldCom adds that, according to the Virginia Commission, reciprocal compensation was the appropriate mechanism for ISP-bound traffic prior to the new regime.[832] Therefore, WorldCom asserts, there can be no dispute as to the amount that Verizon owes.[833] Furthermore, WorldCom argues, its proposed contract provision regarding past-due payment is an effective enforcement mechanism for future true-ups as necessary.[834]

248. In response, Verizon notes that on May 14, 2001, it sent a letter offer, pursuant to the mirroring rule, to every competitive LEC and commercial mobile radio service (CMRS) provider with which it interconnects in Virginia.[835] Verizon argues that it thereby satisfied the

[828] AT&T Brief at 84; WorldCom Brief at 74. Specifically, AT&T and WorldCom propose that the capped rates for ISP-bound traffic should be available to Verizon only if: "(a) Verizon requests that ISP-bound Traffic be treated at the rates specified in the ISP Remand Order; (b) Verizon offers to exchange all traffic subject to the reciprocal compensation provisions of section 251(b)(5) with LECs, CLECs, and CMRS providers, at these information access rates; and (c) Verizon has paid all past due amounts owed on WorldCom's delivery of ISP-bound Traffic prior to June 14, 2001." *See* AT&T's November Proposed Agreement to Verizon, § 5.7.5.2.2.3; WorldCom's November Proposed Agreement to Verizon, Part C, Attach. I, § 8.3.

[829] WorldCom Brief at 74.

[830] AT&T Brief at 79; WorldCom Brief at 74-76.

[831] AT&T Brief at 79 n.264. AT&T estimates that, throughout the entire Verizon region, the past due amount is in excess of $10 to 20 million. Tr. at 1665.

[832] WorldCom Brief at 74-75, citing *Petition of Cox Virginia Telecom, Inc. for Enforcement of Interconnection Agreement with Bell Atlantic-Virginia, Inc.; Arbitration Award for Reciprocal Compensation for the Termination of Local Calls to Internet Service Providers*, Final Order, Case No. PUC970069 (issued by Virginia Comm'n on Oct. 24, 1997).

[833] WorldCom Brief at 75. WorldCom estimates that Verizon owes WorldCom over $100 million for termination of ISP-bound traffic. WorldCom Reply at 71, citing Tr. at 1834.

[834] WorldCom Brief at 75.

[835] Verizon IC Brief at 7, citing Tr. at 1863-64.

mirroring rule and may avail itself of the rate caps. It argues that the offer need not be included in each interconnection agreement.[836] Verizon also disagrees that it must pay disputed arrearages for ISP-bound traffic before it can avail itself of the rate caps.[837] Verizon notes that these disputes over past-due payments arise under Verizon's existing interconnection agreements with AT&T and WorldCom, and thus do not belong in this arbitration.[838] In any case, Verizon argues, there is no support for such a true-up in the *ISP Intercarrier Compensation Order*.[839] Furthermore, Verizon denies that it owes any past due reciprocal compensation to AT&T or WorldCom under their existing contracts.[840] In this regard, Verizon asserts that neither AT&T nor WorldCom has taken any action to collect past-due amounts under their existing interconnection agreements with Verizon.[841]

(ii) Discussion

249. We agree with Verizon that it has satisfied the mirroring rule through its letter offers, sent to interconnecting carriers in Virginia, to exchange all traffic subject to section 251(b)(5) at the capped rates.[842] The *ISP Intercarrier Compensation Order* does not specify the manner in which this offer must be made. We do not believe that contract language covering Verizon's commitment is necessary, particularly since neither AT&T nor WorldCom suggests that Verizon has not fulfilled the requirements of the mirroring rule. Given our decision below to memorialize in the contract the rates at which Verizon has offered to exchange this traffic, we are not concerned that Verizon will attempt to end its compliance with the mirroring rule in the absence of a change of law. Accordingly, we reject AT&T's and WorldCom's proposed language on the mirroring rule.[843]

250. We also decline to adopt AT&T and WorldCom's language requiring payment of disputed compensation amounts for ISP-bound traffic prior to June 14, 2001, the effective date of

[836] *Id.*

[837] *Id.* at 7-8.

[838] *Id.* at 8. Verizon notes that the existing interconnection agreements have dispute resolution mechanisms, through which AT&T and WorldCom can seek past-due compensation.

[839] *Id.*

[840] *Id.* n.3.

[841] Verizon IC Reply at 5-6 n.22.

[842] Verizon submitted an example letter offer as an exhibit to this arbitration. *See* Verizon Ex. 55.

[843] AT&T and WorldCom articulate the mirroring rule through two separate provisions in each of their proposed contracts. *See* AT&T's November Proposed Agreement to Verizon, § 5.7.5.2.2.3(a), (b); WorldCom's November Proposed Agreement to Verizon, Part C, Attach. I, § 8.3(a), (b). We reject each of these provisions for both parties.

the *ISP Intercarrier Compensation Order*.[844] The order does not indicate that this type of dispute must be resolved before the incumbent LEC can avail itself of the capped rates. As Verizon correctly notes, these disputes arise under its existing interconnection agreements with AT&T and WorldCom. Accordingly, they should be resolved pursuant to the dispute resolution mechanisms or other enforcement options available under those agreements.[845]

c. Change of Law Provision

251. In the event that the *ISP Intercarrier Compensation Order* is successfully appealed or modified, the petitioners each propose a change of law provision establishing the appropriate intercarrier compensation regime for ISP-bound traffic, with a retroactive effect on amounts due.[846] The petitioners argue that such provisions are important because the order remains subject to further modification and review.[847] Verizon opposes inclusion of these provisions in the contracts. Because each party has agreed to a general change of law provision, we reject the petitioners' change of law provisions that are specific to this issue.

(i) Positions of the Parties

252. AT&T asserts that, because of the uncertainty created by the ongoing review of the controlling Commission order, the interconnection agreement should contain a change of law provision specific to the issue of compensation.[848] Under AT&T and WorldCom's specific change of law provisions, upon reversal or modification of the Commission's order, ISP-bound traffic would be deemed section 251(b)(5) traffic subject to reciprocal compensation.[849] They add that, in this situation, retroactive payment would be due for the period when, consistent with the terms of the *ISP Intercarrier Compensation Order*, Verizon did not pay the higher reciprocal

[844] Accordingly, we reject AT&T's proposed section 5.7.5.2.2.3(c); and WorldCom's proposed Part C, Attachment I, section 8.3(c), and the remaining text in section 8.3.

[845] We express no opinion on the appropriate compensation mechanism for ISP-bound traffic before June 14, 2001, or on any amounts that may be due.

[846] *See* AT&T's November Proposed Agreement to Verizon, § 5.7.5.2.5; WorldCom's November Proposed Agreement to Verizon, Part C, Attach. I, § 8.6; Cox's November Proposed Agreement to Verizon, § 5.7.7.1(c).

[847] *See WorldCom, Inc. v. FCC*, 288 F.3d at 434-34 (remanding order to Commission, holding that section 251(g) does not support Commission's conclusion that ISP-bound traffic falls outside section 251(b)(5)). Although the court remanded the matter to the Commission, we expect that, because the court did not vacate the Commission's rules or decide what rate should apply to ISP-bound traffic, the petitioners' concerns persist.

[848] AT&T Brief at 85.

[849] AT&T's November Proposed Agreement to Verizon, § 2.5; WorldCom's November Proposed Agreement to Verizon, Part C, Attach. I, § 8.6. *See* Tr. at 1673; WorldCom Brief at 78-79. WorldCom conceded at the hearing, however, that the *ISP Intercarrier Compensation Order* does not assert at any point that reciprocal compensation for ISP-bound traffic was required by law prior to the order. Tr. at 1686.

compensation rate for termination of ISP-bound traffic.[850] WorldCom asserts that interconnection agreements typically contain analogous provisions regarding replacement of agreed-to rates caused by an intervening change in law, and sometimes also give the new rates retroactive application.[851] WorldCom argues that the interconnection agreement's general change of law provision would not settle uncertainties regarding ISP intercarrier compensation, because the general provision requires negotiation of new contract terms and Verizon has no incentive to negotiate on this issue.[852] Moreover, WorldCom and Cox assert that the history between the carriers of disagreeing on the appropriate compensation for ISP-bound traffic compels a provision that specifies the proper compensation in the event that the *ISP Intercarrier Compensation Order* is successfully appealed.[853]

253. Verizon argues that the petitioners' issue-specific change of law provisions are unnecessary in light of the agreements' general change of law provisions, which would apply if the federal rules governing ISP-bound traffic are successfully appealed or modified.[854] Verizon further argues that AT&T and WorldCom's retroactivity provisions fail to offer an equivalent true-up for Verizon to account for the higher reciprocal compensation rates that Verizon paid for ISP-bound traffic before the *ISP Intercarrier Compensation Order* became effective.[855] Verizon argues that, under the petitioners' proposed change of law provisions, section 251(b)(5) reciprocal compensation for ISP-bound traffic would result from even the most nominal modification of the order, regardless of whether the Commission's interim rates were disturbed by the appeal.[856]

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[850] AT&T's November Proposed Agreement to Verizon, § 2.5; WorldCom's November Proposed Agreement to Verizon, Part C, Attach. I, § 8.6.

[851] WorldCom Brief at 79 n.41, citing WorldCom Pet., Ex. D (Interconnection Agreement Governing Current Relations), Attach. I, Table 1.

[852] WorldCom Brief at 79 n.40; WorldCom Reply at 70.

[853] WorldCom Brief at 78; Cox Brief at 33-34; Cox Reply at 24. WorldCom notes that, because Verizon maintains that ISP-bound traffic is not subject to reciprocal compensation, a successful appeal would result in Verizon refusing to pay for delivery of ISP-bound traffic altogether. WorldCom Reply at 70 & n.27. Cox does not argue for retroactive payment of reciprocal compensation for ISP-bound traffic upon successful appeal of the order. Cox Brief at 34 n.134; Cox Reply at 23-24. Cox's proposal would apply, *inter alia*, if the *ISP Intercarrier Compensation Order* were "affected by any legislative or other legal action." Cox's November Proposed Agreement to Verizon, § 5.7.7.1(c).

[854] Verizon IC Brief at 12; Verizon IC Reply at 7.

[855] Verizon IC Brief at 12-13.

[856] *Id.* at 13; Verizon IC Reply at 7-8. WorldCom's change of law provision would apply "if any legislative, regulatory, or judicial action, rule, or regulation modifies, reverses, vacates, or remands the ISP Remand Order, in whole or in part." WorldCom's November Proposed Agreement to Verizon, Part C, Attach. I, § 8.6. AT&T's change of law provision would apply section 251(b)(5) reciprocal compensation to ISP-bound traffic "at such time as the ISP Remand Order is stayed, reversed or modified." AT&T's November Proposed Agreement to Verizon, § 2.5.

(ii) Discussion

254. We agree with Verizon that the general change of law provision in each interconnection agreement is sufficient to address any changes that may result from the ongoing proceedings relating to the *ISP Intercarrier Compensation Order*. None of the petitioners demonstrates that the general change of law provision would be inadequate to effectuate any court decision that reverses, remands or otherwise modifies the *ISP Intercarrier Compensation Order*. Verizon has asserted, as to Cox, that its general change of law provision's renegotiation terms would be activated by a reversal, other court decision, or remand of the *ISP Intercarrier Compensation Order*.[857] It appears that the same is true for the change of law provisions in the agreements with AT&T and WorldCom.[858] Additionally, the dispute resolution procedures incorporated into the parties' general change of law provisions are sufficient to address the petitioners' concerns that any change of law would trigger protracted negotiations when Verizon has no incentive to reach agreement.[859] Therefore, in light of the agreed-to general change of law provisions and related dispute resolution procedures, we reject the petitioners' proposed change of law provisions that are specific to this issue.[860]

255. We also find troubling those portions of AT&T and WorldCom's proposed change of law provisions that would retroactively increase the compensation due for delivery of ISP-bound traffic in the event of any stay, modification or (in the case of WorldCom) remand of the *ISP Intercarrier Compensation Order*.[861] These proposals sweep too broadly and could, as Verizon argues, be triggered by a modification or remand that did not reject, or even address, the

[857] Tr. at 1790-92. *See* Verizon's November Proposed Agreement to Cox, § 27.

[858] *See* Verizon's November Proposed Agreement to AT&T, § 27; *see also* Issues IV-113/VI-1-E *infra* (adopting WorldCom's proposed section 25.2 of Part A).

[859] For example, according to the agreed-to general change of law provisions between Cox and Verizon, the parties commit to two rounds of good-faith negotiations that cannot exceed 45 days each. If they still cannot reach agreement, either side may file a complaint with the Virginia Commission or take other appropriate regulatory or legal action. *See* Verizon's November Proposed Agreement to Cox, § 28.9. *See also* Verizon's November Proposed Agreement to AT&T, § 28.11; Verizon's November Proposed Agreement to WorldCom, Part A, § 14; WorldCom's November Proposed Agreement to Verizon, Part A § 13; Issue IV-101 (dispute resolution provisions).

[860] Accordingly, we reject AT&T's November Proposed Agreement to Verizon, § 5.7.5.2.5; WorldCom's November Proposed Agreement to Verizon, Part C, Attach. I, § 8.6; and Cox's November Proposed Agreement to Verizon, § 5.7.7.1(c).

[861] AT&T proposes that upon a stay, reversal or modification of the order, "then (1) ISP-bound Traffic shall be deemed Local Traffic retroactive to the effective date of this Agreement; (2) any compensation that would have been due under this Agreement since its effective date for the exchange of ISP-bound traffic shall immediately be due and payable." AT&T's November Proposed Agreement to Verizon, § 5.7.5.2.5. WorldCom proposes that certain contract provisions, including rates, "may be voided by either Party . . . if any legislative, regulatory, or judicial action, rule, or regulation modifies, reverses, vacates, or remands the ISP Remand Order, in whole or in part," adding that ISP-bound traffic would be deemed section 251(b)(5) traffic, and retroactive payment would be due. WorldCom's November Proposed Agreement to Verizon, Part C, Attach. I, § 8.6.

order's rate structure for ISP-bound traffic. Indeed, we note that the D.C. Circuit's recent remand of the *ISP Intercarrier Compensation Order* likely would have triggered at least WorldCom's proposed language, even though the court expressly declined to reach the issue of rates for ISP-bound traffic.

d. Definition of "Internet Traffic"

256. In the *ISP Intercarrier Compensation Order*, the Commission determined that ISP-bound traffic is not subject to the reciprocal compensation provisions of section 251(b)(5).[862] Generally speaking, the order focused on traffic bound for ISPs over the public switched telecommunications network, which the Commission referred to as "ISP-bound traffic." Because the order "carved out" ISP-bound traffic as one category of traffic not subject to section 251(b)(5) reciprocal compensation, the parties argue about precisely how to define the rest of the universe of traffic that is not subject to section 251(b)(5) reciprocal compensation. Verizon also proposes the term "Measured Internet Traffic" to define the traffic that is bound for an ISP and therefore not subject to reciprocal compensation under section 251(b)(5).

(i) Positions of the Parties

257. The petitioners assert that Verizon's proposed contract, which provides that reciprocal compensation does not apply to "interstate or intrastate Exchange Access, Information Access, or exchange services for Exchange Access or Information Access,"[863] is over-inclusive and could be read to exclude from reciprocal compensation not only ISP-bound traffic, but also other forms of information access traffic, or more broadly, all of the traffic types listed in section 251(g).[864] Cox argues that Verizon's proposed language improperly reverses the presumption in section 251(g), exempting the traffic types listed therein from reciprocal compensation, rather than, as the statute requires, leaving in place previous compensation regimes until they have been superseded by new rules.[865]

258. WorldCom complains that Verizon's defined term, "Measured Internet Traffic," which incorporates another Verizon-defined term – "Internet Traffic" – defines ISP-bound traffic more broadly than does the *ISP Intercarrier Compensation Order* and therefore generates

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862 *See ISP Intercarrier Compensation Order*, 16 FCC Rcd at 9166-74, paras. 34-47. As we note above, this order has been remanded to the Commission. *See WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002).

863 *See, e.g.*, Verizon's November Proposed Agreement to WorldCom, Part C, Interconnection Attach., § 7.3.1.

864 WorldCom Brief at 80; Cox Reply at 22-23; *see* Verizon's November Proposed Agreement to AT&T, § 1.68(a); Verizon's November Proposed Agreement to WorldCom, Part C, Interconnection Attach., § 7.3.1; Verizon's November Proposed Agreement to Cox, § 1.60a. According to WorldCom, exclusion of information access services could affect "traffic to other enhanced service providers that has traditionally been treated as local." WorldCom Brief at 80.

865 Cox Reply at 23, citing 47 U.S.C. § 251(g).

confusion.[866] AT&T complains that Verizon's proposed definition of "Measured Internet Traffic" includes not only traffic delivered to an ISP, but also any traffic that is delivered to a customer and that is "transmitted to or returned from the Internet at any point during the duration of the transmission."[867] AT&T argues that, through this definition, Verizon is attempting to expand the universe of traffic exempted from reciprocal compensation by including all traffic that traverses the Internet and is delivered to any customer, not just traffic delivered to an ISP.[868] AT&T argues that, for example, Verizon could seek to use this language to avoid paying compensation for packet-switched voice calls.[869]

259. Verizon argues that the petitioners' approaches are under-inclusive. Verizon claims that petitioners' language is inconsistent with the Commission's rules because petitioners fail to exclude certain types of traffic, especially toll traffic, from section 251(b)(5) reciprocal compensation.[870] The result, according to Verizon, is that access traffic and toll traffic in particular would be subject to reciprocal compensation by being grouped together with bona fide section 251(b)(5) traffic traditionally rated as "local."[871] In this context, Verizon argues that AT&T's use of the terms "local traffic" and "voice traffic" are problematic because they fail to account for certain distinctions that the Commission has recognized. Verizon says the correct approach focuses instead on traffic subject to section 251(b)(5) reciprocal compensation obligations, together with traffic excluded from those obligations by section 251(g).[872]

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866 *See* WorldCom Brief at 79. On August 7, 2001, Cox filed a motion to strike the term "Internet Traffic" that Verizon added through the filing of a revised JDPL, after the parties had previously agreed to a definition of ISP-bound traffic. Cox Motion to Strike Untimely Raised Issues Related to Issue I-5 at 4 (filed Aug. 7, 2001) (Cox Motion to Strike). Cox argued that Verizon's proposed definition of "Internet Traffic" is overbroad, and could be construed to extend beyond dial-up ISP-bound traffic into other advanced telecommunications services such as IP telephony. *Id.* at 5-6. In an August 17, 2001 letter, we granted Cox's motion in part, striking the term "Internet Traffic" from Verizon's proposed language to the extent that Verizon sought to use the term and definition to introduce an issue beyond the implementation of the Commission's Order. Letter from Jeffrey H. Dygert to Scott Randolph and Alexandra Wilson (Aug. 17, 2001) (*August 17 Letter Order*). In a September 18, 2001 revised JDPL, Verizon continued to use the term "Internet Traffic," prompting Cox to file a motion to enforce the *August 17 Letter Order*. Cox Motion to Enforce the August 17 Order (filed Sept. 21, 2001).

867 AT&T Brief at 80-81. Verizon has agreed, with respect to Cox and WorldCom, to define "Measured Internet Traffic" to include only traffic delivered to an ISP, not this broader category of traffic delivered to any customer.

868 *Id.*; *see also* Verizon's November Proposed Agreement to AT&T, § 1.52(a).

869 AT&T Brief at 81.

870 Verizon IC Brief at 4.

871 *Id.* at 4.

872 *Id.* at 4-5. Verizon notes that the Pennsylvania and Maryland Commissions have rejected a "local traffic" definition, in favor of "reciprocal compensation traffic." *Id.* at 4, citing *Petition of Sprint Communication Co., L.P. for an Arbitration Award Pursuant to 47 U.S.C. § 252(b)*, Opinion and Order, A-310183F002, at 47 (issued by Pennsylvania Comm'n Oct. 14, 2001); *In re Arbitration of Sprint Communications Co., L.P. v. Verizon Maryland,*
(continued….)

260. With regard to its definition of Measured Internet Traffic, Verizon asserts that when it describes traffic that is delivered to a customer *or* an ISP, there is no real distinction between the two terms within the definition.[873] In addition, as noted above, through its hearing testimony, Verizon agreed to replace the phrase "delivered to a customer or an ISP" with "delivered to an ISP" in Cox's contract.[874] It appears that Verizon has made the same change in its proposed contract to WorldCom.[875]

(ii) Discussion

261. We disagree with Verizon's assertion that every form of traffic listed in section 251(g) should be excluded from section 251(b)(5) reciprocal compensation. In remanding the *ISP Intercarrier Compensation Order* to the Commission, the D.C. Circuit recently rejected the Commission's earlier conclusion that section 251(g) supports the exclusion of ISP-bound traffic from section 251(b)(5)'s reciprocal compensation obligations.[876] Accordingly, we decline to adopt Verizon's contract proposals that appear to build on logic that the court has now rejected.[877] We address below Verizon's argument that exchange access (*e.g.*, toll traffic) should not be subject to reciprocal compensation under the Commission's rules.

262. Furthermore, we agree that use of Verizon's term "Measured Internet Traffic" rather than "ISP-bound traffic," which is the term used by the Commission in the *ISP Intercarrier Compensation Order*, may be confusing. Verizon's term does not appear in the petitioners' language that we adopt herein. Accordingly, we reject it and its companion term "Internet Traffic."[878]

e. Rebuttable Presumption of 3:1

263. Rather than requiring parties separately to identify ISP-bound traffic and section 251(b)(5) traffic for purposes of calculating intercarrier compensation, the *ISP Intercarrier*

(Continued from previous page)
Inc., Pursuant to Section 252(b), Order No. 77320, Case No. 8887, at 23-24 (issued by Maryland Comm'n Oct. 24, 2001).

873 Tr. at 1740-41.

874 *Id.* at 1784. We note that Verizon was referring to section 1.41(a) of Verizon's proposed agreement with Cox.

875 *See* Verizon's November Proposed Agreement to WorldCom, Part C, Interconnection Attach., § 7.12.

876 *WorldCom v. FCC*, 288 F.3d at 433-34.

877 Therefore, we strike Verizon's November Proposed Agreement to AT&T, § 1.68(a); Verizon's November Proposed Agreement to WorldCom, Part C, Interconnection Attach., § 7.3.1 and corresponding language in § 7.14; Verizon's November Proposed Agreement to Cox, § 1.60a.

878 Accordingly, we reject Verizon's November Proposed Agreement to AT&T, § 1.52(a); Verizon's November Proposed Agreement to Cox, §§ 1.36, 1.41; and Verizon's November Proposed Agreement to WorldCom, Part C, Interconnection Attach., §§ 7.10, 7.12.

Compensation Order created a rebuttable presumption that "traffic delivered to a carrier, pursuant to a particular contract, that exceeds a 3:1 ratio of terminating to originating traffic is ISP-bound traffic."[879] To rebut this presumption, a carrier must demonstrate to the relevant state commission that the 3:1 ratio fails accurately to reflect the traffic flow.[880] The parties offer competing language to implement the 3:1 ratio and procedures for rebutting it.[881] We adopt the petitioners' language.

(i) Positions of the Parties

264. AT&T describes the 3:1 calculation in terms of separating "local traffic" from ISP-bound traffic.[882] Specifically, AT&T defines "local traffic" as traffic that stays within a local calling area as determined by the NPA-NXX codes of the calling and called parties;[883] it does not consider any toll traffic qualifying for access payments to be subject to the 3:1 calculation.[884] AT&T contends that it defines "ISP-bound traffic" in the same manner as the *ISP Intercarrier Compensation Order* uses the term.[885] WorldCom also asserts that it would not include intraLATA toll calls in the 3:1 calculation.[886] However, WorldCom does seek to include within the 3:1 calculation its traffic originating over both interconnection trunks and UNE-platform arrangements.[887] WorldCom argues that nothing in its proposal precludes rebuttal of the 3:1 presumption; indeed, it offers to make explicit the rebuttable nature of the 3:1 presumption.[888]

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879 *ISP Intercarrier Compensation Order*, 16 FCC Rcd at 9187-88, para. 79.

880 *Id.*

881 *See* Verizon's November Proposed Agreement to AT&T § 5.7.4; AT&T's November Proposed Agreement to Verizon, § 5.7.5.2.1; Verizon's November Proposed Agreement to Cox § 5.7.4; Cox's November Proposed Agreement to Verizon, § 5.7.7.3(a); Verizon's November Proposed Agreement to WorldCom , Part C, Interconnection Attach., § 7.3.2.1; WorldCom's November Proposed Agreement to Verizon, Part C, Attach. 1, § 8.4.

882 AT&T Brief at 80; AT&T's November Proposed Agreement to Verizon, § 2.1.

883 AT&T Brief at 80 n.269, citing AT&T's November Proposed Agreement to Verizon, § 1.51. The rating of calls based on the NPA-NXX codes of the calling and called parties is discussed in Issue I-6 below.

884 Tr. at 1654.

885 AT&T Brief at 80. Specifically, AT&T clarifies that the term ISP-bound traffic "shall have the same meaning, when used in this Agreement, as used in the [*ISP Intercarrier Compensation Order*]." AT&T's November Proposed Agreement to Verizon, § 1.46.

886 WorldCom Reply at 67; Tr. at 1689.

887 WorldCom Brief at 76-77; WorldCom's November Proposed Agreement to Verizon, Part C, Attach. I, § 8.4.1.

888 WorldCom Brief at 76 n.39; WorldCom Reply at 67-68.

Cox also proposes contractual provisions to implement the 3:1 calculation.[889] Cox states that, according to its proposed language, toll traffic would not be subjected to the 3:1 calculation.[890]

265. Verizon disagrees with each petitioner's approach to implementing the 3:1 calculation, largely based on its interpretation that the petitioners would include all traffic, whether "local" or "toll," in the calculation.[891] Verizon's approach, as noted earlier, is to exclude all traffic listed in section 251(g) from reciprocal compensation and, hence, the 3:1 calculation.[892] In addition to Verizon's concern about traffic types, Verizon also argues that AT&T and WorldCom's language, if adopted, should specifically note the rebuttable nature of the 3:1 presumption.[893]

(ii) Discussion

266. The petitioners' language implementing the 3:1 presumption is largely consistent with the *ISP Intercarrier Compensation Order*. We adopt their proposed contract language, modifying AT&T's and WorldCom's to clarify that the 3:1 presumption is rebuttable.[894] The petitioners have all asserted that exchange access traffic types, including traffic that has traditionally been rated as "toll," would not be included in the 3:1 calculation. We see nothing in the petitioners' proposed contracts that would suggest a contrary result. Having rejected in the preceding section Verizon's argument that all categories of section 251(g) traffic should be excluded from section 251(b)(5) reciprocal compensation, we decline to follow Verizon's approach of excluding that "universe" of traffic from the 3:1 calculation. The petitioners are not proposing to subject exchange access traffic to the 3:1 calculation, and their proposed contracts cannot be read to do so.

267. With regard to WorldCom's argument that both its originating interconnection trunk and UNE-platform traffic should be subject to the 3:1 calculation, we note that Verizon has agreed to include WorldCom's originating UNE-platform traffic.[895] We find that traffic originating on WorldCom's interconnection trunks should also be included in the 3:1

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[889] Cox Brief at 33; Cox's November Proposed Agreement to Verizon, § 5.7.7.3(a).

[890] *See* Cox Reply at 22-23.

[891] Verizon IC Brief at 4; Verizon IC Reply at 1-2.

[892] Verizon IC Reply at 1-2.

[893] *Id.* at 2-3.

[894] *See* AT&T's November Proposed Agreement to Verizon, § 5.7.5.2.1; WorldCom's November Proposed Agreement to Verizon, Part C, Attach. I, §§ 8.4, 8.4.2; Cox's November Proposed Agreement to Verizon, § 5.7.7.3(a). Further, we reject Verizon's competing language. *See* Verizon's November Proposed Agreement to AT&T, § 5.7.4; Verizon's November Proposed Agreement to Cox, § 5.7.4; Verizon's November Proposed Agreement to WorldCom, Part C, Interconnection Attach., § 7.3.2.1.

[895] *See* Tr. at 1853-54.

calculation.[896] The *ISP Intercarrier Compensation Order* does not distinguish between UNE-platform traffic and originating interconnection trunk traffic in its application of the 3:1 ratio. We conclude, therefore, that both categories of traffic should be included in this calculation. Verizon has offered no reason why we should reach a contrary conclusion.

268. Finally, we agree with Verizon that at least AT&T's proposal could be read as making the 3:1 presumption irrebuttable and is therefore inconsistent with the *ISP Intercarrier Compensation Order*. To make AT&T's proposal consistent with the *ISP Intercarrier Compensation Order*, we substitute the phrase "shall be presumed, subject to rebuttal, to be" for the phrase "shall be conclusively defined as" in both places where this phrase appears in AT&T's proposed section 5.7.5.2.1. We also direct WorldCom to modify its section 8.4 proposal explicitly to reflect the rebuttable nature of the 3:1 presumption, as it agreed to do.[897]

f. Audits and Billing Factors

269. The *ISP Intercarrier Compensation Order* does not set forth any specific billing or auditing measures to govern intercarrier compensation for ISP-bound traffic. AT&T proposes certain additional provisions that establish billing factors, blended rates and audits. Verizon opposes AT&T's language. Meanwhile, Verizon proposes auditing provisions to Cox that would allow it unilaterally to conduct audits of Cox's traffic at any time. We adopt AT&T's provisions that establish billing factors, while rejecting the additional issue-specific auditing provision that AT&T proposes to Verizon, and that Verizon proposes to Cox.

(i) Positions of the Parties

270. AT&T proposes quarterly billing in which the relative percentage of section 251(b)(5) traffic to ISP-bound traffic from the first two months of a calendar quarter establishes the appropriate compensation for the subsequent quarter.[898] AT&T proposes that Verizon must calculate quarterly factors that represent Verizon's assessment of the relative amounts of section 251(b)(5) and ISP-bound traffic between the carriers.[899] AT&T then proposes blended rates that incorporate these established factors so that the single applicable rate for all traffic consists of the section 251(b)(5) rate and the ISP-bound traffic rate weighted according to the proportion established by the quarterly billing factors.[900] Finally, AT&T proposes contract language that allows it specifically to audit these calendar quarter factors and their associated bills.[901]

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[896] Accordingly, we adopt WorldCom's proposed section 8.4.1 of Attachment I.

[897] *See* WorldCom Brief at 76 n.39; WorldCom Reply at 67-68.

[898] *See* AT&T's November Proposed Agreement to Verizon, § 5.7.5.2.4.2.

[899] *See id.* § 5.7.5.2.4.3.

[900] *See id.* § 5.7.5.2.4.4.

[901] *See id.* § 5.7.5.2.4.5.

271. Cox criticizes Verizon's proposal that would grant an unlimited, unilateral right for Verizon to audit the relative proportions of Cox's section 251(b)(5) and ISP-bound traffic to determine whether proper rates are being charged.[902] Cox argues that the audit right proposed by Verizon is unfairly unilateral in nature, and that Verizon could abuse it with burdensome audit requests.[903] Furthermore, Cox argues, Verizon does not need an auditing provision specifically for ISP-bound traffic because the *ISP Intercarrier Compensation Order* alone makes it possible for Verizon to raise a concern about traffic flow to the Virginia Commission at any time.[904] Additionally, the parties have agreed to a general auditing provision, giving either party the right to conduct an audit twice per year (or more, if discrepancies are found) which, Cox argues, offers Verizon sufficient protection.[905]

272. Verizon argues that AT&T's proposals for billing factors and blended rates go beyond the specific requirements of the *ISP Intercarrier Compensation Order* and therefore do not belong in this interconnection agreement.[906] Verizon also offers specific criticisms of each. With regard to AT&T's proposal to estimate a calendar quarter's compensation based on the first two months of the previous quarter, Verizon argues that the provision would fail to protect the parties against changes in relative volumes of traffic during the third month of the previous quarter.[907] Verizon states that it would agree to AT&T's language if it were modified to provide for a true-up, available for the subsequent quarter, based on the third month's actual balance of traffic.[908] Verizon opposes AT&T's proposal concerning the calculation of traffic factors, arguing that it is not in any better position than AT&T to assess them and, therefore, should not have the responsibility of calculating the factors that AT&T seeks to impose on it.[909] Finally, Verizon simply disagrees with a blended rate structure, contending that the *ISP Intercarrier Compensation Order* provides no support for such a provision.[910] Verizon adds that AT&T's auditing provision is unnecessary because there is already an agreed-to general auditing provision in its interconnection agreement with AT&T.[911]

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[902] Cox Brief at 34-35; Tr. at 1745, citing Verizon's November Proposed Agreement to Cox, § 5.7.8.

[903] Cox Brief at 35.

[904] Cox Brief at 34-35, citing *ISP Intercarrier Compensation Order*, 16 FCC Rcd. at 9187-88 para. 79. During the hearing, Verizon agreed with this assertion. *See* Tr. at 1752-53.

[905] Cox Brief at 34, citing Verizon's November Proposed Agreement to Cox, § 5.7.5.

[906] Verizon IC Brief at 11.

[907] *Id.*

[908] *Id.*

[909] *Id.*

[910] *Id.*

[911] *Id.*

273. Regarding the audit provision it proposes to Cox, Verizon argues that the additional provision is more focused on obtaining data to rebut the 3:1 presumption, while the general provision is meant to monitor minutes of use and the distinction between "local" and "toll" traffic.[912] Verizon concedes, however, that the general provision could indeed function to obtain the same data as the additional provision, yet it does not in Verizon's view go far enough.[913]

(ii) Discussion

274. We adopt AT&T's proposal to determine the split between ISP-bound and 251(b)(5) traffic in a particular quarter by looking to the split between these two categories of traffic in the first two months of the preceding calendar quarter. This should provide an objectively verifiable means to ensure prompt and accurate intercarrier compensation payments between the parties.[914] Additionally, in order to minimize any burden on Verizon, we modify AT&T's proposed language regarding the calculation of traffic factors to provide that AT&T is responsible for the calculations. We also agree with Verizon that the contract should provide for quarterly true-ups that account for changes in traffic proportions that may occur in the third month of a quarter.[915]

275. We reject AT&T's proposal for blended rates based on the factors that each party will develop.[916] We agree with Verizon that, with the exception of the mirroring rule, the *ISP Intercarrier Compensation Order* does not contemplate a blended rate applicable to all traffic exchanged between carriers. We conclude that the proposal for traffic factors, which we have just adopted, will permit the parties adequately to determine the amounts of traffic compensable as ISP-bound and subject to section 251(b)(5), respectively. We also reject AT&T's proposed

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[912] Tr. at 1751.

[913] Tr. at 1751-52.

[914] Accordingly, we adopt AT&T's November Proposed Agreement to Verizon, §§ 5.7.5.2.4, 5.7.5.2.4.1, 5.7.5.2.4.2.

[915] Accordingly, we adopt AT&T's proposed section 5.7.5.2.4.3 but revise it to read as follows:

> AT&T will calculate the factors to be used for the relative percentage of minutes of use of total combined Voice Traffic and ISP-bound Traffic represented by each type of traffic during periods referred to in section 5.7.5.2.4.2 above, and AT&T will notify Verizon of such factors in writing by no later than the first day of the period during which such factors will be used. Such factors will govern all billing during the applicable period, and, on a quarterly basis, the Parties will true up any billing for prior periods based on actual balance of traffic during such period.

[916] Accordingly, we reject AT&T's proposed section 5.7.5.2.4.4.

auditing provision,[917] and agree with Verizon that the availability of an agreed-to general auditing provision is sufficient for the parties to audit the traffic factors and associated bills.[918]

276. We also reject Verizon's proposed language that would give it extra auditing rights with respect to Cox.[919] Verizon can already accomplish the aim of its additional auditing provision through the agreed-to, general auditing provision.[920] Verizon has offered no justification for the unlimited, unilateral audit privilege that it seeks.

g. Rates, Not Just Caps

277. The *ISP Intercarrier Compensation Order* establishes an interim compensation regime by limiting the rate for ISP-bound traffic according to a cap that declines over a period of years.[921] The order does not, however, specify the exact rate for terminating ISP-bound traffic; it preserves the right of state commissions to set a rate below the applicable cap.[922] The parties disagree over whether their agreements should set the actual rates, or leave them to subsequent negotiations. We adopt the petitioners' proposals to include the rates.

(i) Positions of the Parties

278. The petitioners argue that the contracts must specify rates, rather than merely refer to caps.[923] They assert that the rates should be set at the caps that are established by the *ISP Intercarrier Compensation Order*.[924]

279. Verizon argues that its interconnection agreements need not set rates because the Virginia Commission could order rates below the caps at any time, in accordance with the *ISP Intercarrier Compensation Order*.[925] Verizon concedes, however, that the Virginia Commission has not yet set a rate for termination of ISP-bound traffic.[926] Verizon also agrees

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917 Accordingly, we reject AT&T's proposed section 5.7.5.2.4.5.

918 *See* Verizon's November Proposed Agreement to AT&T, § 28.10 (general auditing provisions).

919 Specifically, we reject Verizon's proposed section 5.7.8 made to Cox.

920 *See* Verizon's November Proposed Agreement to Cox, § 5.7.5 (general auditing provision).

921 *See ISP Intercarrier Compensation Order*, 16 FCC Rcd at 9186-87, paras. 77-78.

922 *Id.* at 9188, para. 80.

923 AT&T Brief at 82; WorldCom Brief at 76; Cox Brief at 33.

924 *See* AT&T's November Proposed Agreement to Verizon, § 5.7.5.2.2.2; WorldCom's November Proposed Agreement to Verizon, Part C, Attach. I, § 8.3.2; Cox's November Proposed Agreement to Verizon, § 5.7.7.2(b)-(e).

925 Tr. at 1761-64.

926 Tr. at 1761-62.

that the initial rate proposed by the petitioners is the same rate that Verizon proposed in its May 14, 2001 letter offers to all competitive carriers in Virginia.[927]

(ii) Discussion

280. We adopt the petitioners' proposed contracts regarding rates for termination of ISP-bound traffic.[928] If, before the adoption of the *ISP Intercarrier Compensation Order*, the Virginia Commission had adopted rates, applicable to the exchange of ISP-bound traffic, that were lower than the caps reflected in the *Order*, the Virginia Commission's rates would govern. Because the parties agree, however, that the Virginia Commission has not set a rate for termination of ISP-bound traffic, the rate caps in the *ISP Intercarrier Compensation Order* are the rates governing the exchange of ISP-bound traffic in Virginia. Furthermore, we note that the rates the petitioners propose to include in their interconnection agreements are the rates at which Verizon has already agreed to exchange traffic in Virginia. We earlier determined that it was not necessary to memorialize in the interconnection agreement Verizon's offer to comply with the mirroring rule[929]; however, it is insufficient for ISP-bound traffic rates to be established by mere reference to Verizon's letter offers issued to comply with the mirroring rule. Therefore, we find no reason to leave the rates out of these interconnection agreements.

h. Growth Caps

281. Apart from the rate caps discussed above, the *ISP Intercarrier Compensation Order* also imposes a cap, with a limited annual growth factor, on the volume of ISP-bound traffic minutes for which LECs are entitled to compensation.[930] This "growth cap" builds on the number of ISP-bound minutes for which carriers were entitled to compensation under a particular contract during a baseline period, the first quarter of 2001.[931] The petitioners propose language to establish this baseline amount, together with the growth cap calculation, in order to avoid future disputes.[932] Verizon opposes the inclusion of any such language or, at a minimum, argues that the growth cap calculation should include only those ISP-bound minutes for which a LEC is

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[927] Tr. at 1865.

[928] Accordingly, we adopt AT&T's proposed section 5.7.5.2.2.2; WorldCom's proposed section 8.3.2 of its Attachment I; and Cox's proposed sections 5.7.7.2(b)-(e). We note that Cox's proposal establishes single rates for delivering ISP-bound traffic to either a tandem or an end office. Verizon conceded at the hearing that, as Cox argues, rates should be uniform whether tandem or end office interconnection applies. *See* Tr. at 1776-78; Cox Brief at 31-32.

[929] *See* subsection b. above, discussing the mirroring rule.

[930] *See ISP Intercarrier Compensation Order*, 16 FCC Rcd at 9187, para. 78.

[931] *Id.*

[932] *See* AT&T's November Proposed Interconnection Agreement to Verizon, § 5.7.5.2.3; WorldCom's November Proposed Interconnection Agreement to Verizon, Part C, Attach. I, § 8.5; Cox's November Proposed Interconnection Agreement to Verizon, § 5.7.7.4.

entitled to compensation. We adopt the petitioners' proposed language with certain modifications.

(i) Positions of the Parties

282. The petitioners incorporate the growth cap calculation methodology into their proposed contracts.[933] AT&T proposes that the growth cap baseline should be established by subjecting all traffic that it exchanged with Verizon in the first quarter of 2001 to the Commission's 3:1 presumption.[934] This means that the baseline amount would equal either party's minutes of terminating non-toll traffic that was equal to three times the minutes of the other party's terminating non-toll traffic during the first quarter of 2001. AT&T disagrees with Verizon's limitation on the calculation—to include only those minutes for which a LEC is entitled to compensation—because, it asserts, Verizon likely would apply to this limitation a unilateral determination that AT&T was not entitled to compensation for any of the ISP-bound traffic during the first quarter of 2001.[935] AT&T argues that its proposal would minimize disputes, in tandem with the Commission's 3:1 presumption.[936] WorldCom asserts that, in any case, Verizon did not object during the hearing to contract language that would establish, and therefore settle, the minutes of ISP-bound traffic for which WorldCom was eligible for compensation during the first quarter of 2001.[937] Cox proposes to include the actual baseline amount (rather than merely the calculation methodology) in its interconnection agreement with Verizon.[938] Cox also argues that its growth cap calculation for 2002 should be based on the previous year's calculated cap, rather than on the previous year's actual traffic.[939]

283. Verizon argues that the growth cap baseline calculation should be explicitly qualified to include only those ISP-bound minutes for which a LEC was entitled to compensation, in accordance with the *ISP Intercarrier Compensation Order*.[940] Verizon opposes

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933 AT&T Brief at 83; WorldCom Brief at 77; Cox Reply at 22 n.80.

934 AT&T Reply at 43.

935 *Id.* at 41-42.

936 *Id.* at 43.

937 WorldCom Brief at 77, citing Tr. at 1869-71.

938 Cox Brief at 33 n.130.

939 Cox Reply at 22 n.80.

940 Verizon IC Brief at 9, citing *ISP Intercarrier Compensation Order*, 16 FCC Rcd at 9187, para. 78. The order qualifies growth caps to include only those minutes for which a LEC was entitled to compensation:

> For the year 2001, a LEC may receive compensation, pursuant to a particular interconnection agreement, for ISP-bound minutes up to a ceiling equal to, on an annualized basis, the number of ISP-bound minutes *for which that LEC was entitled to compensation* under that agreement during the first quarter of 2001, plus a ten percent growth factor. For 2002, a LEC may receive compensation, pursuant to a particular

(continued….)

AT&T and WorldCom's attempts to remove this qualifier from the calculation, because AT&T and WorldCom are continuing to dispute the amount of compensation to which they are entitled for ISP-bound traffic from the first quarter of 2001.[941] Verizon also disagrees with Cox's 2002 growth cap calculation in that it is strictly based on the 2001 growth cap, rather than on an independent calculation of the number of ISP-bound minutes for which Cox actually was entitled to compensation in 2001.[942]

(ii) Discussion

284. We agree with the petitioners that it is appropriate to include the *ISP Intercarrier Compensation Order*'s methodology for calculating growth caps in their interconnection agreements with Verizon. We agree with Verizon, however, that the order applies the growth caps only to those minutes for which the LECs were entitled to compensation. According to the order, the number of minutes for which a LEC was entitled to compensation is a question to be resolved pursuant to the particular interconnection agreement that governed the exchange of traffic during the first quarter of 2001.[943] Therefore, the number of minutes for which any petitioner was entitled to compensation during the first quarter of 2001 is beyond the scope of this arbitration. AT&T and Cox cannot establish the baseline here using either the 3:1 presumption or the record before us. Accordingly, we adopt the petitioners' proposals, while revising AT&T and WorldCom's language to reflect only those minutes for which they were entitled to compensation, and removing Cox's language establishing the numbers for the actual baseline, and subsequent growth cap, amounts.[944]

(Continued from previous page)

> interconnection agreement, for ISP-bound minutes up to a ceiling equal to the minutes *for which it was entitled to compensation* under that agreement in 2001, plus another ten percent growth factor. In 2003, a LEC may receive compensation, pursuant to a particular interconnection agreement, for ISP-bound minutes up to a ceiling equal to the 2002 ceiling applicable to that agreement.

Id. (emphasis added).

[941] Verizon IC Brief at 9-10.

[942] *Id.* at 10 n.4.

[943] *See ISP Intercarrier Compensation Order*, 16 FCC Rcd at 9187, para. 78.

[944] Thus, we adopt AT&T's proposed section 5.7.5.2.3, but replace the second sentence with the following: "The parties shall first determine the total number of minutes of use of ISP-bound Traffic, for which they were entitled to compensation, terminated by one Party for the other Party for the three-month period commencing January 1, 2001 and ending March 31, 2001." We adopt WorldCom's proposed section 8.5 of Attachment I, but replace the first sentence with the following: "For ISP-bound Traffic exchanged during the year 2001, and to the extent this Agreement remains in effect during that year, the information access rates set out in Section 8.3.2 shall be billed by MCIm to Verizon on ISP-bound Traffic for MOU only up to a ceiling equal to, on an annualized basis, the number of ISP-bound Traffic minutes, for which MCIm was entitled to compensation, that originated on Verizon's network and was delivered by MCIm during the first quarter of 2001, plus a ten percent growth factor." Finally, we adopt Cox's proposed section 5.7.7.4(a), but replace the last two sentences with the following: "The cap for total Internet Traffic minutes for 2001, expressed on an annualized basis, is calculated by multiplying the first quarter total by four and increasing the result by ten percent."

285. We disagree with Verizon's criticism of Cox's language implementing the growth cap for 2002.[945] Verizon asserts that "the number of ISP-bound minutes for which [Cox] is entitled to compensation in 2001 may be *less* than the 2001 cap itself."[946] While that may be true, the calculation of minutes to which Cox was entitled to compensation in 2002 is the product of the cap in 2001 and the 10 percent growth factor. The *ISP Intercarrier Compensation Order* established a baseline – the first quarter of 2001 – as a starting point for all subsequent calculations. The growth cap for 2002 does not reflect a calculation independent of the first quarter of 2001, based on actual traffic for the whole of 2001.

2. Issue I-6 (Toll Rating and Virtual Foreign Exchanges)

a. Introduction

286. The parties disagree over how to determine whether a call passing between their networks is subject to reciprocal compensation (traditionally referred to as "local") or access charges (traditionally referred to as "toll"). The petitioners advocate a continuation of the current regime, which relies on a comparison of the originating and terminating central office codes, or NPA-NXXs, associated with a call. Verizon objects to the petitioners' call rating regime because it allows them to provide a virtual foreign exchange ("virtual FX") service that obligates Verizon to pay reciprocal compensation, while denying it access revenues, for calls that go between Verizon's legacy rate centers. This virtual FX service also denies Verizon the toll revenues that it would have received if it had transported these calls entirely on its own network as intraLATA toll traffic. Verizon argues simply that "toll" rating should be accomplished by comparing the geographical locations of the starting and ending points of a call.

287. Of particular importance to this issue is a comparison of the two sides' FX services. When Verizon provides FX service ("traditional FX"), it connects the subscribing customer, via a dedicated private line for which the subscriber pays, to the end office switch in the distant rate center from which the subscriber wishes callers to be able to reach him without incurring toll charges. Verizon then assigns the FX subscriber a number associated with the distant switch. By contrast, when the petitioners provide their virtual FX service, they rely on the larger serving areas of their switches to allow callers from a distant Verizon legacy rate center to reach the virtual FX subscriber without incurring toll charges. Thus, the petitioners simply assign the subscriber an NPA-NXX associated with the rate center the subscriber designates and rely on their switches' broad coverage, rather than a dedicated private line, to transport the calls between legacy rate centers.

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945 Accordingly, we also adopt Cox's proposed section 5.7.7.4(b), but revise it by replacing the last sentence with the following: "The cap for total Internet Traffic minutes for 2002 is calculated by increasing the cap for total Internet Traffic minutes for 2001 by ten percent." Finally, we adopt Cox's proposed sections 5.7.7.4(c)-(e) without revision.

946 *See* Verizon IC Brief at 10 n.4.

288. We adopt the petitioners' proposed language for this issue. Verizon has failed to propose a workable method for rating calls based on their geographical end points, and it has alleged no abuse in Virginia of the process for assigning NPA-NXX codes.

b. Positions of the Parties

289. AT&T notes that Verizon itself compares originating and terminating NPA-NXXs when it decides whether to charge reciprocal compensation for completing calls from another carrier's customer to Verizon's FX subscribers.[947] If the two relevant NPA-NXXs are within the same rate center, Verizon charges reciprocal compensation for its completion of the call, regardless of where a caller is actually located.[948] AT&T argues that section 251(b)(5) similarly obligates Verizon to pay reciprocal compensation for calls to AT&T's virtual FX customers when the Verizon customer's NPA-NXX falls within the same rate center as the virtual FX subscriber's number does.[949]

290. AT&T disagrees with Verizon's argument that section 251(g) exempts virtual FX traffic from section 251(b)(5)'s reciprocal compensation obligation.[950] According to AT&T, section 251(g) merely grandfathered pre-existing rules governing exchange access and information access, and there were no such rules relating to the category of traffic at issue here.[951] AT&T further asserts that virtual FX traffic is not exchange access traffic, which involves, by definition, the origination and termination of telephone toll calls.[952] AT&T notes that telephone toll service is defined as "telephone service between stations in different exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange service."[953] Because AT&T does not impose a separate charge for its virtual FX service, AT&T argues that it is not a toll service. Accordingly, AT&T argues, it falls within the section 251(b)(5) reciprocal compensation regime rather than being subject to Verizon's access tariffs.[954]

291. AT&T also argues that its proposal does not impose any additional costs upon Verizon, whether or not virtual FX is involved, because AT&T designates a single POI for an NPA-NXX and Verizon's responsibility for transporting a call ends there, regardless of the

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[947] AT&T Brief at 88-89.

[948] *Id.* at 89.

[949] *Id.* at 92, citing 47 U.S.C. § 251(b)(5).

[950] *Id.* at 90-93.

[951] *Id.* at 92-93.

[952] *Id.* at 93, citing 47 U.S.C. § 153(16).

[953] *Id.*, citing 47 U.S.C. § 153(48).

[954] *Id.*

physical location of the AT&T customer.[955] AT&T argues that it would be redundant and inefficient for it to mimic Verizon's traditional FX service by purchasing a dedicated private line, as Verizon proposes. AT&T asserts that such an arrangement would leave it at a serious competitive disadvantage.[956]

292. AT&T defends the structure of its virtual FX service, noting that Verizon does not claim that the petitioners are receiving NPA-NXX code assignments in exchanges where they do not actually serve customers of their own.[957] AT&T distinguishes the Maine Commission decision upon which Verizon relies, noting that such numbering abuse is not at issue between AT&T and Verizon in Virginia.[958] AT&T further asserts that, under Verizon's proposal, AT&T would have to obtain NPA-NXX code assignments in every rate center where it has a customer, even though customers in some rate centers may be satisfied with numbers from another Verizon rate center.[959] AT&T argues that this itself would unnecessarily waste numbering resources.[960]

293. AT&T further notes that, if Verizon were to prevail in treating AT&T's virtual FX traffic as toll traffic, there would have to be some way to segregate the virtual FX traffic from section 251(b)(5) traffic.[961] AT&T asserts that there is currently no way to accomplish this by, as Verizon suggests, comparing the physical end points of a call.[962] Furthermore, AT&T argues that a traffic study to determine the relative percentages of virtual FX and section 251(b)(5) traffic would be costly and overly burdensome.[963]

294. WorldCom asserts that every carrier in the country, including Verizon, rates calls by comparing originating and terminating NPA-NXX codes and that no state has devised a

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[955] *Id.* at 89-90.

[956] *Id.* at 96. AT&T notes that this interoffice transport is unnecessary according to AT&T's network architecture of a single switch with a single POI. *Id.* at 96 n.323, citing Tr. at 1908.

[957] *Id.* at 93-94; *id.* at 94 n.317, citing Tr. at 1909.

[958] AT&T Reply at 49, citing AT&T Ex. 8 at 56-57. The Maine Commission revoked NPA-NXX assignments when it found that a competitive LEC was receiving numbering assignments for exchanges where the competitive LEC served no customers. *See Investigation Into Use of Central Office Codes (NXXs) by New England Fiber Communications, Inc., LLC*, Dkt No. 98-78, Maine PUC (rel. June 30, 2000). AT&T notes that, in any case, this Maine decision was concerned with abuses related to ISP-bound traffic during the era before adoption of the Commission's *ISP Intercarrier Compensation Order*. AT&T Reply at 49.

[959] AT&T Brief at 94.

[960] *Id.*

[961] *Id.*

[962] *Id.* at 95, citing Tr. at 1813, 1815, 1905.

[963] AT&T Reply at 47, citing Verizon IC Brief at 19.

different method to distinguish between "local" and toll traffic.[964] WorldCom asserts that the Commission has never held that the physical locations of the calling and called parties determine whether a call is "local"; it has left the determination of "local" calling areas to the states.[965] WorldCom also notes that Verizon's billing system cannot identify the physical location of a calling or called party, even though Verizon proposes to base its intercarrier compensation regime on that foundation.[966] WorldCom notes that Verizon's network is not the only one providing transport to and from virtual NPA-NXXs.[967] According to WorldCom, it often hauls traffic for much longer distances than does Verizon.[968] In any case, WorldCom notes, its virtual FX service does not change the average transport distance for Verizon because the incumbent LEC still must transport the traffic to WorldCom's POI.[969]

295. WorldCom takes issue with Verizon's assertion that it loses toll revenues because of virtual FX service. WorldCom notes that the basic enticement of a virtual FX is that it enables a calling party to call a business in a distant location without incurring a toll charge. Absent a virtual local number, WorldCom argues, the caller would typically find a similar vendor that has a local number.[970] Thus, according to WorldCom, without its virtual FX offering, the call to the distant location likely would not take place at all.[971]

296. WorldCom argues that it should not be required to purchase a dedicated private line from Verizon and provide traditional FX service. According to WorldCom, this would eliminate competitive pressure and freeze rates at their current levels because the competitive LEC would essentially replace all the private-line revenue that Verizon would otherwise have lost when it lost the FX customer.[972] WorldCom argues that Verizon's proposed requirement also would prevent WorldCom from exploiting the advantages of its unique network architecture: Verizon's traditional FX service transports calls between two switches, while WorldCom typically serves an equivalent area with one switch.[973]

964 WorldCom Brief at 82.

965 WorldCom Reply at 76, citing *Local Competition Order*, 11 FCC Rcd. at 16013-14, para. 1035.

966 WorldCom Brief at 84.

967 *Id.* at 87.

968 *Id.* at 88.

969 *Id.*

970 *Id.* at 89.

971 *Id.*

972 *Id.*

973 *Id.*

297. Cox argues that Verizon is trying to force it to match Verizon's network architecture.[974] Cox further asserts that Verizon's end-to-end compensation regime is infeasible and that Verizon makes no workable proposal for determining the originating and terminating points of a call.[975] Cox argues that Verizon compares apples to oranges when it complains that it receives compensation for transporting calls to Verizon's FX customers, but not for transporting virtual FX calls to Cox's switch.[976] Cox asserts that Verizon's costs for delivering traffic to Cox have nothing to do with the nature of the underlying service, but rather with the distance to Cox's switch.[977] The difference in compensation, Cox notes, arises from the dedicated private line charge that Verizon imposes on its traditional FX customers—a charge that Verizon obviously cannot impose on Cox's customers.[978]

298. Finally, Cox notes that Verizon need not be concerned about NPA-NXX code assignment abuses, because state commissions have acted quickly to correct such abuses, and Verizon has not shown evidence of any abuse here.[979] According to Cox, this arbitration is not the appropriate forum to evaluate compliance with such regulatory requirements.[980]

299. Verizon argues that the petitioners are effectively trying to thwart Verizon's access regime by treating toll traffic as "local" traffic.[981] Verizon asserts that the *ISP Intercarrier Compensation Order* supports its position that a call's jurisdiction is based on its end points.[982] Accordingly, Verizon argues, there is no difference between a virtual FX call and a toll call.[983] In contrast to virtual FX, Verizon asserts that its traditional FX service is an alternative pricing structure for toll service, rather than a "local" service as claimed by the petitioners.[984] Verizon

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974 Cox Brief at 35. Verizon admits, Cox notes, that requiring a competitive LEC to duplicate Verizon's network architecture is inefficient and unnecessarily costly. *Id.* at 36-37, citing Tr. at 1822-23.

975 Cox Brief at 39, citing Tr. at 1811-12; Cox Reply at 27-28, citing Tr. at 1812-14.

976 Cox Brief at 37.

977 *Id.* at 37. Notably, Cox asserts that Verizon does not split access revenues for traditional FX calls with Cox or other competitive LECs. Cox Reply at 26.

978 Cox Brief at 37-38.

979 *Id.* at 40.

980 *Id.*

981 Verizon IC Brief at 16.

982 *Id.*, citing *ISP Intercarrier Compensation Order,* 16 FCC Rcd at 9159-60, 9163, paras. 14, 25.

983 *Id.* at 17.

984 *Id.* at 18.

argues that the petitioners should assume financial responsibility for virtual FX traffic by paying Verizon for transport from the calling area of the Verizon caller to the petitioner's POI.[985]

300. Verizon acknowledges that virtual FX traffic cannot be distinguished from "local" traffic at Verizon's end office switches.[986] Verizon proposes, however, that the petitioners conduct a traffic study or develop a factor to identify the percentage of virtual FX traffic.[987] Verizon would then exchange the identified proportion of traffic either pursuant to the governing access tariff or on a bill and keep basis under its VGRIP proposal.[988] Finally, Verizon notes that several state commissions, including Maine, Connecticut, Missouri, Texas and Georgia, have found that virtual FX traffic is not subject to reciprocal compensation.[989]

c. Discussion

301. We agree with the petitioners that Verizon has offered no viable alternative to the current system, under which carriers rate calls by comparing the originating and terminating NPA-NXX codes. We therefore accept the petitioners' proposed language and reject Verizon's language that would rate calls according to their geographical end points.[990] Verizon concedes that NPA-NXX rating is the established compensation mechanism not only for itself, but industry-wide.[991] The parties all agree that rating calls by their geographical starting and ending points raises billing and technical issues that have no concrete, workable solutions at this time.[992]

302. Verizon proposed, late in this proceeding, that the petitioners should conduct a traffic study to develop a factor to account for the virtual FX traffic that appears to be "local"

[985] Verizon IC Reply at 11.

[986] Verizon IC Brief at 19.

[987] *Id.* at 19.

[988] *Id.*

[989] *Id.* at 19-21.

[990] Thus, we adopt WorldCom's November Proposed Agreement to Verizon, Attachment I, § 4.2.1.2 (subject to modifications accomplished below in connection with Issue IV-35); Cox's November Proposed Agreement to Verizon, §§ 5.7.1 and 5.7.4; and AT&T's November Proposed Agreement to Verizon, § 1.51. We have previously rejected the proposals that Verizon offers to AT&T with respect to this issue. *See supra* Issues I-1 and VII-4 (rejecting , Verizon's November Proposed Agreement to AT&T, § 5.7.3); Issue I-5, subsection (d) (rejecting Verizon's November Proposed Agreement to AT&T, §1.68a). We reject Verizon's November Proposed Agreement to WorldCom, Part B, § 2.81; we have previously rejected Verizon's Proposed Agreement to WorldCom, Part C, Interconnection Attach., § 7.2. *See supra* Issue I-2. We reject the last sentence of Verizon's November Proposed Agreement to Cox, § 5.7.1; we have previously rejected Verizon's November Proposed Agreement to Cox, § 1.60a. *See supra* Issue I-5.

[991] *See* Tr. at 1889-1900.

[992] *See* AT&T Brief at 95; WorldCom Brief at 84; Cox Brief at 39; Tr. at 1812-13.

traffic. However, Verizon's contract fails to lay out such a mechanism in any detail. Most importantly, Verizon concedes that currently there is no way to determine the physical end points of a communication, and offers no specific contract proposal to make that determination.[993]

303. Additionally, we note that state commissions, through their numbering authority, can correct abuses of NPA-NXX allocations. As discussed earlier, the Maine Commission found that a competitive LEC there was receiving NPA-NXXs for legacy rate centers throughout the state of Maine although it served no customers in most of those rate centers.[994] To the extent that Verizon sees equivalent abuses in Virginia, it can petition the Virginia Commission to review a competitive LEC's NPA-NXX allocations.

3. Issue III-5 (Tandem Switching Rate)

a. Introduction

304. In the *Local Competition First Report and Order*, the Commission found that the costs of transport and termination are likely to vary depending on whether traffic is routed through a tandem switch or routed directly to an end-office switch.[995] It concluded, therefore, that states may establish different transport and termination rates for tandem-routed traffic that reflect the additional costs associated with tandem switching.[996] It also recognized, however, that new entrants might employ network architectures or technologies different than those employed by the incumbent LEC.[997] It thus adopted a rule stating that "[w]here the switch of a carrier other than an incumbent LEC serves a geographic area comparable to the area served by the incumbent LEC's tandem switch, the appropriate rate for the carrier other than the incumbent LEC is the incumbent LEC's tandem interconnection rate."[998] Recently, in the *Intercarrier Compensation NPRM*, the Commission clarified that in order to receive the tandem rate under section 51.711(a)(3), a competitive LEC need only demonstrate that it serves a geographic area comparable to that of the incumbent LEC; it need not establish functional equivalency.[999]

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993 *See* Tr. at 1812-13.

994 *See Investigation Into Use of Central Office Codes (NXXs) by New England Fiber Communications, Inc., LLC d/b/a/ Brooks Fiber*, Docket No. 98-78, Maine PUC (rel. June 30, 2000).

995 *Local Competition First Report and Order*, 11 FCC Rcd at 16042, para. 1090.

996 *Id.*

997 *Id.*

998 47 C.F.R. § 51.711(a)(3).

999 *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Notice of Proposed Rulemaking, 16 FCC Rcd 9610, 9648, para. 105 (2001) (*Intercarrier Compensation NPRM*); *see also* Letter from Thomas J. Sugrue, Chief, Wireless Telecommunications Bureau, FCC and Dorothy T. Attwood, Chief, Common Carrier Bureau, FCC to Charles McKee, Senior Attorney, Sprint PCS (May 9, 2001) (clarifying that geographic comparability alone is sufficient).

AT&T, WorldCom, and Verizon disagree about the standard for establishing geographic comparability under section 51.711(a)(3). AT&T and WorldCom argue that they are entitled to Verizon's tandem rate when any of their switches is capable of serving a geographic area comparable to the area served by Verizon's tandem switch. Verizon argues that the tandem rate is only available when the competitive LEC's switch actually serves a comparable geographic area. We adopt the petitioners' language.

b. Positions of the Parties

305. AT&T argues that the geographic comparability test requires a demonstration by the competitive LEC that its switch is merely *capable* of serving, rather than actually serves, a geographic area comparable to that of the incumbent LEC tandem.[1000] AT&T asserts that there is no basis in the *Local Competition First Report and Order* or in the Commission's rules to require *actual service* to a comparable geographic area.[1001] Furthermore, AT&T notes, Commission precedent does not define the parameters of any such "actual service" standard.[1002] AT&T argues that its position is also consistent with state commission and federal court precedent.[1003] AT&T adds that, to the extent the tandem rate rule is meant as a proxy for the costs incurred by the competitive LEC to terminate a call from an incumbent LEC, Verizon has offered no cost or other evidence demonstrating that it is inappropriate to use this proxy when the competitive LEC's switch is capable of serving an area comparable to the area served by the incumbent LEC's tandem.[1004] According to AT&T, Verizon has also failed to explain how its proposed "actually serves" standard would be defined and implemented.[1005]

306. AT&T also disagrees with Verizon's alternative proxy proposal, which would estimate the reciprocal compensation rate that AT&T would charge Verizon by using the average

[1000] AT&T Brief at 98.

[1001] *Id.*

[1002] *Id.*

[1003] *Id.* at 99. The Michigan Commission, AT&T notes, found that a competitive LEC met the geographic comparability test based on its capability to serve the same customers as the incumbent LEC, even though the competitive LEC had fewer customers and locations. *Id.*, citing *Petition of MediaOne Telecommunications of Michigan, Inc. for Arbitration Pursuant to Section 252(b) of the Federal Telecommunications Act of 1996 to Establish an Interconnection Agreement with Ameritech Michigan*, Michigan Public Service Commission, Case No. U-12198, Opinion and Order at 18 (issued by Michigan Comm'n Mar. 3, 2000). In addition, AT&T notes, a federal court found that a competitive LEC's capability to serve an equivalent geographic area was sufficient even though the competitive LEC was not actually providing service throughout the incumbent LEC's territory. AT&T Brief at 99, citing *US West Communications, Inc. v. Minnesota Public Utilities Commission*, 55 F. Supp. 2d 968 (D.Minn. 1999).

[1004] AT&T Brief at 100.

[1005] *Id.* at 100-101. In any case, AT&T argues, Verizon cannot assert that the *Intercarrier Compensation NPRM* requires an even distribution of customers across the geographic area. AT&T Reply at 52, citing Verizon Intercarrier Compensation (IC) Brief at 24-25.

rate charged by Verizon to AT&T for call termination during the previous calendar quarter.[1006] This Verizon proposal would apply if AT&T demonstrates that its switches perform both tandem and end office functions.[1007] AT&T contends that this Verizon proposal has nothing to do with whether AT&T's switch serves a geographic area comparable to Verizon's tandem, and thus is inconsistent with the Commission's rule.[1008] AT&T also argues that Verizon's average termination costs are completely unrelated to AT&T's termination costs, since Verizon's costs depend upon AT&T's decisions whether to deliver traffic to a Verizon tandem or a Verizon end office.[1009] According to AT&T, such a proxy would punish the competitive LEC for trying to reduce Verizon's termination costs, since Verizon would pay a lower rate if the competitive LEC chose, over time, to terminate traffic at Verizon end offices rather than at tandems.[1010] Apart from these objections, AT&T asserts that, as a factual matter, all of its switches qualify for the tandem rate.[1011]

307. WorldCom asserts that its fiber-intensive network architecture allows a single switch to access a much larger geographic area than that served by the numerous switches of Verizon's copper-based, hierarchical network.[1012] WorldCom objects to Verizon's proposal that the tandem rate be available only if the competitive LEC has a geographically dispersed customer base.[1013] WorldCom argues that a competitive LEC's success in attracting a geographically dispersed customer base is not relevant, because the competitor has to make an investment in its network before it is even able to serve customers.[1014] In any case, WorldCom argues, Verizon fails to propose a methodology to demonstrate geographic dispersion, and Verizon's own witness conceded that he did not know how such a test would be administered.[1015] As a factual matter, WorldCom asserts that all of its switches qualify for the tandem rate.[1016]

[1006] AT&T Brief at 101.

[1007] *Id.* at 101.

[1008] *Id.* at 101-02.

[1009] *Id.* at 102.

[1010] AT&T Reply at 54.

[1011] AT&T Brief at 102.

[1012] WorldCom Brief at 92. In fact, according to WorldCom, each one of its switches in the Washington, DC area serves an area that is comparable to, or greater than, the service area of any of Verizon's 12 tandem switches serving the same Virginia rate centers. WorldCom Brief at 93.

[1013] WorldCom Brief at 94.

[1014] *Id.* at 95.

[1015] WorldCom Reply at 80, citing Tr. at 1600-01, 1606.

[1016] WorldCom Brief at 90. WorldCom also contends that Verizon does not dispute that WorldCom's switches satisfy the geographic comparability test. *Id.* at n.53.

308. As a general principle, Verizon argues that competitive LECs must demonstrate that their switches are actually serving, rather than merely capable of serving, a geographic area comparable to that of Verizon's tandem.[1017] Verizon argues that the *Local Competition First Report and Order*, section 51.711(a)(3), and the recent *Intercarrier Compensation NPRM* support its position that competitive LECs bear the burden of proof with respect to actual geographic comparability.[1018] Simply put, Verizon argues that if the Commission ever meant to describe capability to serve rather than actual service, it would have done so.[1019] Verizon adds that several state commission decisions support its position.[1020] According to Verizon, both AT&T and WorldCom have failed to offer evidence about the geographic scope of service, and have instead merely offered evidence purporting to show that their end office switches are capable of serving areas comparable to Verizon's tandems.[1021] Furthermore, Verizon argues that it would be unfair for AT&T and WorldCom to be able to pay either the tandem or end office rate, depending on how they choose to route their traffic, while Verizon must always pay the tandem rate for termination by AT&T and WorldCom.[1022] Verizon proposes that, as to AT&T, Verizon should pay an averaged rate according to Verizon's call termination charges to AT&T,

[1017] Verizon IC Brief at 24-25.

[1018] *Id.* at 24-25, citing *Local Competition First Report and Order*, 11 FCC Rcd at 16042, para. 1090; 47 C.F.R. § 51.711(a); *Intercarrier Compensation NPRM*, 16 FCC Rcd at 9648, para. 105.

[1019] Verizon IC Reply at 13.

[1020] Verizon IC Brief at 25. Verizon notes that the Texas Commission held that the competitive LEC must demonstrate it is actually serving, rather than merely capable of serving, the comparable geographic area in order to receive the tandem rate. *See Proceeding to Examine Reciprocal Compensation Pursuant to Section 252 of the Federal Telecommunications Act of 1996*, Arbitration Award, at 28-29 (issued by Texas Comm'n July 2000). AT&T argues, however, that the Texas decision engaged in the kind of tandem functionality analysis that the Commission later rejected in the *Intercarrier Compensation NPRM*, and therefore it is irrelevant. AT&T Brief at 99. Verizon also cites to the California and Florida Commissions, which held that the ability to serve an area, or a plan for future customers, does not satisfy the tandem rate rule. *See Application by AT&T Communications of California, Inc., et al. (U 5002 C) for Arbitration of an Interconnection Agreement with Pacific Bell Telephone Company (U 1001 C) Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Decision No. 00-08-011 at 21-22 (issued by California Comm'n Aug. 3, 2000); *Petition by AT&T Communications of the Southern States, Inc. d/b/a AT&T for arbitration of certain terms and conditions of a proposed agreement with BellSouth Telecommunications, Inc. pursuant to 47 U.S.C. Section 252, Docket No. 000731-TP*, Order No. PSC-01-1402-FOF-TP, Final Order on Arbitration, at 79-80 (issued by Florida Comm'n June 28, 2001). Verizon cites to case law as well. Verizon IC Reply at 13 n.38, citing *MCI Telecommunications Corp. v. Michigan Bell Telephone Co.*, 79 F. Supp. 2d 768, 790-92 (E.D. Mich. 1999) (the "rule focuses on the area currently being served by the competing carrier, not the area the competing carrier may in the future serve").

[1021] Verizon IC Brief at 26-27.

[1022] *Id.* at 27-28.

based on Verizon's relative proportions of end office and tandem terminations during the previous calendar quarter.[1023]

c. Discussion

309. We adopt AT&T and WorldCom's proposals because we determine that they are consistent with the Commission's rule.[1024] As discussed earlier, the Commission clarified in its *Intercarrier Compensation NPRM* that, in order to qualify for the tandem rate, a competitive LEC need only demonstrate that its switch serves a geographic area comparable to that of the incumbent LEC's tandem switch.[1025] Although Verizon has conceded that the tandem rate rule does not have a functionality requirement,[1026] it continues to assert that the competitive LEC switch must actually serve a geographically dispersed customer base in order qualify for the tandem rate. We agree, however, with AT&T and WorldCom that the determination whether a competitive LEC's switch "serves" a certain geographic area does not require an examination of the competitor's customer base. Indeed, Verizon has not proposed any specific standard for AT&T and WorldCom to prove that they are actually serving a geographically dispersed customer base.[1027] The tandem rate rule recognizes that new entrants may adopt network architecture different from those deployed by the incumbent; it does not depend upon how successful the competitive LEC has been in capturing a "geographically dispersed" share of the incumbent LEC's customers,[1028] a standard that would penalize new entrants. We agree with AT&T and WorldCom, therefore, that the requisite comparison under the tandem rate rule is whether the competitive LEC's switch is capable of serving a geographic area that is comparable to the architecture served by the incumbent LEC's tandem switch. We find, moreover, that Verizon appears to concede that the AT&T and WorldCom switches satisfy this standard. In its brief, Verizon states, "At best, [AT&T] has shown that its switches may be *capable of serving*

[1023] *Id.* at 28. Verizon notes that the Pennsylvania Commission adopted such a proposal. *Id.* at 28 n.14, citing *Application of MFS Intelenet of Pennsylvania, Inc. et al.*, Docket Nos. A-310203F0002, A310213F0002, A310236F0002 and A-310258F0002 (issued by Pennsylvania Comm'n Apr. 10, 1997).

[1024] Specifically, we adopt AT&T's November Proposed Agreement, § 5.7.4 and WorldCom's November Proposed Agreement, Attach I, § 4.2.1.4.2. We reject Verizon's November Proposed Agreement to AT&T, §§ 4.1.3 and 5.7.4 and Verizon's November Proposed Agreement to Worldcom, Part C, Interconnection Attach., § 7.1.1. Because we adopt WorldCom's proposal, we deny as moot its motion to strike Verizon's revised contract language for this issue. *See* WorldCom Motion to Strike, Ex. F at 86-88.

[1025] *Intercarrier Compensation NPRM*, 16 FCC Rcd at 9648, para. 105.

[1026] *See* Tr. at 1600 (Verizon agrees with AT&T "that the standard is geographic coverage as opposed to functionality"); *cf. US West Communications, Inc. v. Washington Utilities and Transportation Commission*, 255 F.3d 990 (2001).

[1027] *See* Tr. at 1600-01 (Verizon witness stating he did not know how the Commission should determine whether a competitive LEC's switch actually serves a geographic area comparable to that of Verizon's tandem).

[1028] Accordingly, we also reject Verizon's additional proposal to AT&T, involving rates averaged between tandem and end office terminations.

customers in areas geographically comparable to the areas served by Verizon's tandems," and, "[a]s with AT&T, [WorldCom] offered only evidence relating to the capability of its switches."[1029] As we explain above, such evidence is sufficient under the tandem rate rule and Verizon fails to offer any evidence rebutting the evidence provided by the petitioners. Should there be any future dispute regarding the capability of the petitioners' switches to serve a geographical area comparable to Verizon's switches, we expect the parties to use their agreements' dispute resolution procedures to resolve them.

4. Issue IV-35 (Reciprocal Compensation for Local Traffic)

a. Introduction

310. The parties disagree over language describing the traffic eligible for reciprocal compensation. WorldCom proposes language that would govern the payment of reciprocal compensation for "local traffic" and defines that term to exclude traffic to Internet service providers (ISPs) but to include traffic to other information service providers reached through the dialing of an NPA/NXX within the caller's local calling area.[1030] This proposed language is separate from WorldCom's language governing intercarrier compensation for ISP-bound traffic, which is considered under Issue I-5. Verizon opposes the inclusion of WorldCom's language.[1031] We adopt WorldCom's language subject to certain modifications.

[1029] Verizon IC Brief at 27, citing Tr. at 1589-97 (emphasis in original).

[1030] *See* WorldCom's November Proposed Agreement, Part C, Attach. 1, § 4.2.

[1031] Verizon offers consolidated language, which would cover reciprocal compensation for both ISP and non-ISP-bound traffic. *See* Verizon's November Proposed Agreement to WorldCom, Part C, Interconnection Attach., § 7. We note that the only language identified as at issue *solely* under Issue IV-35 (and under no other issue) is offered by WorldCom and provides that "Reciprocal Compensation for the exchange of Local Traffic is set forth in Table 1 of this Attachment and shall be assessed on a per minute-of-use basis for the transport and termination of such traffic." *See* WorldCom November Proposed Agreement to Verizon, Part C, Attach. I, § 4.2.1.1. Verizon contests this language in the context of its overall challenge to WorldCom's section 4.2. *See* Verizon Intercarrier Compensation (IC) Brief at 29-30. The remaining language proposed by each party under Issue IV-35 is also challenged under other issues. Verizon's proposed language is also considered under Issues I-1 (Single Point of Interconnection), I-2 (Transport of Verizon Traffic from the IP to the POI), I-5 (Intercarrier Compensation for ISP-bound traffic), I-6 (Intercarrier Compensation based on Originating and Terminating NXX Codes), and III-5 (Intercarrier Compensation at the Tandem Rate). WorldCom's proposed language is also considered under Issues I-6 (Intercarrier Compensation based on Originating and Terminating NXX Codes) and III-5 (Intercarrier Compensation at the Tandem Rate). Given our consideration of each of these issues, only a few points remain for discussion under Issue IV-35. We also note that, in November, Verizon modified its proposed language to WorldCom. *See* WorldCom Motion to Strike, Ex. F at 76-83, 86-97 (comparing Verizon's September JDPL with Verizon's November JDPL on language proposed for Issue IV-35 and cross-referencing language proposed for Issue I-5). In its motion to strike, WorldCom argues that Verizon introduced substantively new proposals, in violation of the Commission's procedural order, the requirements of the Administrative Procedure Act, and the Due Process Clause of the Fifth Amendment. *See* WorldCom Motion to Strike at 1-2, 5-8.